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Supreme Court, U.S.
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In The Supreme Court of the United States

RAYAD JIMMY MOHAMMED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err when it affirmed the District Court's dismissal, for failure to state a claim upon which relief could be granted, of the First Amended Complaint of Petitioner/Plaintiff Rayad Jimmy Mohammed ("Mohammed"), a United States citizen since 1996, against Respondent/Defendant United States of America ("the Government") under the Federal Tort Claims Act ("the FTCA") for false arrest and false imprisonment, by means of which pleading he sought to recover damages compensating him for the suffering he had endured during the course of his unlawful detention, confinement and removal from the United States between April, 2005, and March, 2006?

PARTIES TO THE PROCEEDING

The Petitioner is Rayad Jimmy Mohammed, a resident and citizen of the State of Florida. The Respondent is the United States of America, which is organized under the United States Constitution.

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The opinion of the Court of Appeals (Case No. 08-10196) is not reported in the Federal Reporter, Third Series. However, it can be found at 277 Fed. Appx. 951 and 2008 U.S. App. LEXIS 10759 and is reprinted at App. 1-2.

The opinion of the District Court is not reported in the Federal Supplement, Second Series. However, it can be found at 2007 WL 4557145 and 2007 U.S. Dist. LEXIS 94324 and is reprinted at App. 3-15.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 2008. Mohammed's time in which to file this Petition for Writ of Certiorari has been extended until October 12, 2008 (Application No. 08A118). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Prior to its repeal by § 103(a) of the Child Citizenship Act of 2000, Public Law 106-395, 114 Stat. 1631 (October 30, 2000), 8 U.S.C. § 1432, entitled *Children born outside of United States of alien parents; conditions for automatic citizenship*, provided:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in

> the United States while under the age of eighteen years.
>
> (b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

2. Section 1346, Title 28, U.S. Code, is entitled *United States as defendant* and in pertinent part provides:

> (b)(1) Subject to the provisions of chapter 171 of this title [28 U.S.C. §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. Section 2674, Title 28, U.S. Code, is entitled *Liability of United States* and provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.
>
> With respect to any claim under this chapter [28 U.S.C. §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.
>
> With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative

immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter [28 U.S.C. §§ 2671 et seq.].

4. Section 2680, Title 28, U.S. Code, is entitled *Exceptions* and provides:

The provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other

property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture

under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 [46 U.S.C. §§ 30901 et seq. or 31101 et seq.] relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso

[enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

STATEMENT OF THE CASE

A. Proceedings In The Courts Below

Mohammed brought suit against the Government on September 4, 2007, in the U.S. District Court, Southern District of Florida ("the District Court"), which assigned it Case No. 07-22306-Civ-Moore/Garber. In his complaint, Mohammed, a United States citizen, invoked the Federal Tort Claims Act ("the FTCA") and sought damages for false arrest and imprisonment related to his unlawful detention, confinement and removal from the United States by the U.S. Department of Homeland Security ("the DHS").

The Government, on October 22, 2007, moved to dismiss Mohammed's complaint for failure to state a claim upon which relief could be granted. In that motion, the Government asserted that law enforcement/investigatory agents of the DHS had been privileged to detain and confine Mohammed, as an excludable alien, when he had sought entry to the United States at Miami International Airport, Miami, Florida, on April 25, 2005.[1]

Mohammed, on November 15, 2007, filed his First Amended Complaint, in which he alleged that the law enforcement/investigatory agents of the DHS had not been privileged to detain and confine him on

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[1] At no time has the Government claimed that it was privileged to remove Mohammed from the United States.

April 25, 2005. The Government, on November 27, 2007, moved to dismiss Mohammed's First Amended Complaint for failure to state a claim upon which relief could be granted.

On December 5, 2007, Mohammed moved for partial summary judgment on liability. Mohammed, on December 6, 2007, filed a memorandum of law opposing the Government's motion to dismiss his First Amended Complaint.

The Government, on December 10, 2007, moved to stay the deposition examinations of four (4) of its employees[2] who had been responsible for the detention, confinement and removal from the United States of Mohammed. Mohammed, on December 13, 2007, filed an opposing memorandum of law. The Government, on December 14, 2007, filed a memorandum of law opposing Mohammed's summary judgment motion, which memorandum was supported by Mr. Samuels' declaration.[3] In addition, on that date

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[2] Messrs. Carlton Samuels, Loren G. Coy and John Stevenson and Ms. Linda Church.

[3] In pertinent part, Mr. Samuels declared:

> 6. On April 25, 2005, I was on duty at the Inspections Unit at Miami International Airport. The plaintiff, Rayad Jimmy Mohammed, arrived on a flight from Trinidad, and applied for admission to the United States. He presented a Trinidadian passport, as well as a resident alien card to the Officer he encountered in the Primary Inspection area. The plaintiff's name was automatically run through several computer indices. The subject was a match to a

(Continued on following page)

"TBCS Lookout hit" and was referred for Secondary Inspection.

7. Plaintiff was referred to secondary inspection where pertinent checks were completed and a criminal record check determined that he had been convicted in 2001 of burglary and resisting arrest without violence, in Broward County, Florida. The subject was then interviewed and I took a statement from him in which he stated he was a citizen of Trinidad, and was born in Port of Spain, Trinidad, on November 9, 1981. He told me his mother was a United States citizen, as well as his brother, stepfather, stepbrother and stepsister. Plaintiff provided his mother's name, Raabia Roma Khan, and stated she was born in Trinidad. Plaintiff also told me he was not a citizen of the United States. The subject stated he had been arrested for burglary, plead guilty, and was convicted, receiving one-year probation. Mr. Mohammed admitted to serving about one and one half weeks in Broward County Jail. Since burglary is a crime involving moral turpitude, the conviction would render him an alien inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

8. Plaintiff did not advise me when, or how, his mother became a United States citizen, or whether his parents were married or divorced at the time she became a citizen. Plaintiff did not tell me whether his father was alive when his mother became a citizen. He also did not tell me how old he was when his mother became a citizen. Since he did not advise whether his parents were married or divorced at the time his mother became a citizen, he also did not tell me whether his parents were separated, or whether any separation was a "legal separation", pursuant to a formal act by a court.

9. CBP officers working at ports-of-entry, such as Miami International Airport, very rarely have access to the alien file of an applicant for admission. These

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files are stored at National Records Centers located throughout the United States. It takes days, if not weeks, to request and obtain a file that is located at one of these Records Centers. If the files are checked out already, the file may be located at offices of the United States Citizenship and Immigration Services, which adjudicates applications for various immigration benefits, such as naturalization and visa petitions. The file could also be located at United States Immigration and Customs Enforcement, whose responsibility it is to conduct investigations of violations of the immigration laws, operate and maintain detention centers for aliens in removal proceedings, and to represent the Government in removal proceedings. I did not have ready access to the alien file of plaintiff, nor his mother, on April 25, 2005.

10. On April 25, 2005, the subject was placed under oath and asked if he had any reason to believe that he was a citizen of the United States. Mr. Mohammed answered "NO", he was not a citizen of the United States. He presented documents indicating he was an alien, a citizen of Trinidad who had been admitted to lawful permanent residence in the United States in 1996. He did not dispute that he had been convicted of burglary in 2001. Based on this information, I could not determine, clearly and beyond doubt, that he was entitled to be admitted to the United States. Accordingly, I referred him for a removal hearing before an Immigration Judge, pursuant to INA § 240, 8 U.S.C. § 1229a.

Mr. Samuels' declaration was literally correct insofar as it related that Mohammed, on April 25, 2005, had failed to state (a) when or how his mother had become a United States citizen, (b) whether his parents had been divorced when his mother had become a United States citizen, (c) whether his father had been alive when his mother had become a United States citizen, and (d) his age when his mother had become a United States citizen. However, Mr. Samuels' declaration did *not* state that he had

(Continued on following page)

the Government cross-moved for summary judgment of dismissal, which motion was supported by the same declaration of Mr. Samuels.

Mohammed, on December 18, 2007, moved pursuant to Rule 56(f), Federal Rules of Civil Procedure, for an extension of time in which to respond to the Government's cross-motion for summary judgment. In that motion, which was supported by the affidavit of Mohammed's undersigned attorney, he asserted that, in order to respond to the Government's cross-motion for summary judgment, he needed to depose the four (4) employees of the Government who had effectuated his detention, confinement and removal from the United States.

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requested that information from Mohammed on April 25, 2005. Had Mohammed's undersigned counsel been afforded an opportunity to depose Mr. Samuels, that ambiguity would have been explored. Certainly, as between an agent of the DHS and a high school-educated twenty-three-year-old, the burden of inquiry concerning the latter's status as a derivative United States citizen should have rested on the former.

Mr. Samuels' declaration confirms that, due to its primitive record-keeping system, the DHS is unable to ascertain who does or does not hold derivative United States citizenship. It was bad enough that Mohammed, an [initially] uninformed holder of derivative United States citizenship, was illegally detained, confined and removed from the United States. In another case, an ignorant holder of derivative United States citizenship was imprisoned for almost five years following a conviction for unlawful re-entry, in violation of 8 U.S.C. § 1326. *See, Perez v. United States*, 502 F. Supp. 2d 301 (N.D.N.Y., 2006).

The District Court, on December 21, 2007, entered an order granting the Government's motion to dismiss Mohammed's First Amended Complaint. On December 28, 2007, the District Court entered a Final Order Of Dismissal. Mohammed's Notice Of Appeal was filed on January 3, 2008, thereby commencing Eleventh Circuit Case No. 08-10196.

The Court of Appeals, on May 15, 2008, affirmed the District Court's dismissal of Mohammed's lawsuit. The full text of the Eleventh Circuit's opinion follows:

> Rayad Jimmy Mohammed appeals the dismissal with prejudice of his civil action for failure of the complaint to state a claim. Having considered the briefs and relevant parts of the record, we conclude that the district court properly granted the motion to dismiss filed by the United States for the reasons stated in the court's well-reasoned opinion.

B. Mohammed's First Amended Complaint

Mohammed's First Amended Complaint in pertinent part alleged:

> Plaintiff Rayad Jimmy Mohammed ("RJM"), by his undersigned attorneys, sues Defendant United States of America ("the Government") and alleges:
>
> **JURISDICTION**
>
> 1. This is a civil action for money damages in excess of $10,000.00 under the provisions

of the Federal Tort Claims Act, over which this Court possesses subject-matter jurisdiction pursuant to 28 U.S.C. § 1346(b)(1).

THE PARTIES

2. RJM is a citizen and resident of the United States and the State of Florida. He is not subject to any legal disabilities.

3. The Government is organized under and exists pursuant to the Constitution and Statutes of the United States.

VENUE

4. The venue of this civil action is properly laid in the Miami Division, Southern District of Florida, because RJM's cause of action against the Government arises in such Division and District.

CONDITIONS PRECEDENT

5. All conditions precedent to the commencement and prosecution of this civil action have taken place, have been performed or have been waived or excused by the Government. Specifically, on December 5, 2006, RJM's signed and dated written claim, in the sum of $10,000,000.00, against the Government for damages ("RJM's administrative claim") was delivered by certified mail, return receipt requested, to The Honorable Michael Chertoff, Secretary of Homeland Security, U.S. Department of Homeland Security, Washington, D.C. 20528.

THE FACTS

6. RJM was born on November 9, 1981, in the Republic of Trinidad and Tobago ("Trinidad") to Raabia Mohammed (mother) and Solomon Mohammed (father). His mother moved to the United States in 1984. On May 2, 1998, the Supreme Court of the State of New York, New York County, issued a decree divorcing his parents and awarding legal custody of RJM to his mother. Thereafter, his mother married a United States citizen, Mr. Acbel Khan, and she changed her name to Raabia Roma Khan. Following her marriage to Mr. Khan, RJM's mother and step-father petitioned the Government to adjust RJM's status to that of a lawful permanent resident of the United States.

7. On June 9, 1996, RJM's mother was naturalized in Miami, Florida. RJM entered the United States as a lawful permanent resident on August 11, 1996. Since then, he has lived with his mother and step-father at 1061 N.W. 188th Avenue, Pembroke Pines, Broward County, Florida 33029. Consequently, pursuant to the former 8 U.S.C. § 1432, and unknown to him, RJM automatically/derivatively became a United States citizen in 1996 when he entered the United States as a lawful permanent resident.

8. On or about May 21, 2001, RJM was convicted in the Criminal Division, Seventeenth Circuit Court, Broward County, Florida, of burglary and resisting arrest without

violence. *State of Florida v. Rayad Jimmy Mohammed*, Case No. 00-16390 (CF 10A).

9. On April 25, 2005, traveling on a passport issued by, and returning from a visit to, Trinidad, RJM sought entry to the United States at Miami International Airport, Miami, Florida, but was detained by law enforcement and/or investigative officers of the U.S. Department of Homeland Security ("the DHS"), who determined that he was subject to exclusion from the United States on the basis of his 2001 criminal conviction. At the time of his detention, RJM told the DHS officers that his mother was a United States citizen. Moreover, on April 25, 2005, when an employee of the DHS contacted RJM's mother by telephone to inform her of RJM's detention, RJM's mother told the DHS employee that she (RJM's mother) was a United States citizen. RJM was taken into the custody of the DHS and the DHS initiated an alien removal proceeding against him on the basis of his 2001 conviction. *In The Matter Of Rayad Jimmy Mohammed,* File No. A46032385 ("the alien removal proceeding"). Pending the completion of the alien removal proceeding, the DHS confined RJM to the Krome Detention Center, Miami, Florida, where he was subjected to degrading and demoralizing treatment.

10. Represented by private counsel retained for him by his mother, RJM applied for waiver of removal. A hearing was held on July 27, 2005, by the Immigration Court,

Krome Service Processing Center, Miami, Florida. At the conclusion of the hearing, the Immigration Judge denied RJM's application for waiver of removal and directed that RJM be removed to Trinidad. RJM initially advised the Immigration Court that he desired to prosecute an appeal. However, on August 2, 2005, he notified the Immigration Court that he no longer desired to pursue an appeal. On August 30, 2005, the DHS removed RJM from the United States to Trinidad.

11. Following the entry of the Immigration Court's July 27, 2005, removal order, RJM's mother retained new counsel for him, Attorney Barbara W. Kamali, of Miami, Florida. Citing the former 8 U.S.C. § 1432, *supra*, on August 15, 2005, Ms. Kamali moved that the Immigration Court reopen RJM's removal proceeding and to vacate the July 27, 2005, removal order because RJM was a United States citizen. The Immigration Court, on August 15, 2005, entered an order staying RJM's removal and scheduling a hearing for September 12, 2005. Unfortunately, that order was not released to counsel for the DHS and Ms. Kamali until September 1, 2005, by which date RJM had already been removed from the United States to Trinidad.

12. On February 1, 2006, the DHS informed Ms. Kamali that RJM had automatically/derivatively acquired United States citizenship in 1996 pursuant to the former 8 U.S.C. § 1432, *supra*. Thereafter, RJM applied to the United States Embassy in Port of

Spain, Trinidad, for a United States passport. On March 2, 2006, the United States Embassy in Trinidad issued a United States passport to RJM and he then entered the United States as a citizen.

13. On March 9, 2006, the United States Department of Justice, Executive Office For Immigration Review, moved to reopen and terminate the alien removal proceeding against RJM on the ground that he was a United States citizen. That motion was granted by the Immigration Court on March 9, 2006.

* * *

THE FTCA AS APPLIED TO THIS CASE

17. The DHS officers who detained, confined and removed RJM from the United States were "investigative or law enforcement officers" within the scope of the *proviso* to 28 U.S.C. 2680(h).

18. The DHS officers who detained, confined and removed RJM from the United States were acting within the scope of their employment and, under the law of the State of Florida, falsely arrested and imprisoned him in that:

> (a) they intentionally, unlawfully and completely restrained RJM against his will, thereby depriving him of his liberty and expelling him, a citizen of the United States, from his homeland; and

> (b) because they had been put on actual notice that RJM's mother was a United States citizen and then failed to investigate whether RJM held derivative United States citizenship pursuant to the former 8 U.S.C. § 1432, they were not privileged so to do.
>
> 19. As the direct consequences of his having been falsely arrested and imprisoned by "investigative or law enforcement officers" of the Government, RJM suffered bodily injury and resulting pain and suffering, disability, disfigurement, loss of personal liberty, mental anguish, loss of capacity for the enjoyment of life, loss of earnings and loss of ability to earn money. The losses are either permanent or continuing and RJM will suffer the losses in the future.
>
> WHEREFORE, RJM demands judgment for damages against the Government.

C. The District Court's Opinion

In dismissing the First Amended Complaint, the District Court adopted Mohammed's four (4) phase analysis.

With respect to Phase I, which began on April 25, 2005, and ended on June 23, 2005, the District Court determined that Mohammed had been lawfully detained, confined and referred to removal proceedings, even though the Government's agents on April

25, 2005, had been told that his mother was a naturalized United States citizen. App. 8-10.

Concerning Phase II, which began on June 23, 2005, and ended on August 12, 2005, the District Court determined that the provision of Mrs. Khan's naturalization certificate to the Assistant Chief Counsel, Immigration and Customs Enforcement, representing the Government in the alien removal proceeding had not put the Government on notice that Mohammed held derivative United States citizenship. App. 10-14.

With respect to Phase III, which began on August 12, 2005, and ended on August 31, 2005, the District Court determined that Mohammed's (a) application to the DHS for a stay of removal and (b) motion to reopen the alien removal proceeding on the ground that he possessed derivative United States citizenship had not rendered Mohammed's confinement unlawful because the Government had been entitled to rely on the Immigration Judge's removal order. App. 14.

Concerning Phase IV, which began on August 31, 2005, and ended on March 2, 2006, the District Court determined that Mohammed's exile from the United States was not actionable because:

> The Court finds that the time it took to process and determine that Plaintiff was a U.S. citizen did not constitute false imprisonment.

> Further, in this case, merely refusing Plaintiff entrance into the U.S. would not constitute false imprisonment.

App. 14-15.

As previously noted, the Court of Appeals affirmed the District Court's dismissal of Mohammed's lawsuit and approved the District Court's reasons for doing so. App. 1-2.

REASON FOR GRANTING THE WRIT

Professors Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, in their treatise, *Immigration Law and Procedure* (Matthew Bender & Company, Inc., 2007), observe:

> The chief difference in status between a national or citizen of the United States and an alien doubtless relates to the right to enter and remain in the United States. An alien can be barred from entering the United States on any ground specified by Congress. A U.S. citizen cannot be barred from entering the United States. A noncitizen national is not subject to exclusion under the present immigration laws, which apply only to aliens. In addition, an alien can be expelled (*i.e.*, deported) from the United States on any ground specified by Congress, while a citizen is not subject to deportation. A noncitizen

national is not subject to deportation under the present immigration laws.

Id., § 91.05[1][b].

* * *

The children of naturalized citizens are a major category whose status as American citizens does not result from their own solicitation. In a sense, of course, their status usually emerges from the naturalization process, since the naturalization of the parent is ordinarily a prerequisite to its establishment. But unlike the judicial or, now, administrative, naturalization of the parent, the child's citizenship vests automatically upon the satisfaction of the prescribed qualifications, and does not depend upon his submission of any application, or the satisfaction of the substantive or procedural requirements applicable to those who seek naturalization. As noted elsewhere, a child who has automatically derived citizenship under this section can obtain a certificate in his own name, verifying his status as an American citizen.

The status described in this section is generally described as derivative citizenship. Insofar as it deals with foreign born children and is transmitted through their parents, it resembles the citizenship by descent discussed in Chapter 93. The obvious difference is that citizenship by descent is transmitted by the American citizens at birth, while the derivative citizenship discussed in this section is

> transmitted after birth, upon the naturalization of the parents. (Footnotes omitted)

Id., § 98.03[1].

In *Erickson v. Pardus, supra,* the District Court dismissed a state prison inmate's complaint – that his rights under the Eighth Amendment to the United States Constitution had been violated by his removal from a treatment program for hepatitis C – on the basis that he had failed to allege that he had suffered "substantial harm" and the Tenth Circuit affirmed on the ground that the complaint was "conclusory". The Court, in a *per curiam* opinion, vacated the Court of Appeals' judgment and remanded for further proceedings:

> It may in the final analysis be shown that the District Court was correct to grant respondents' motion to dismiss. That is not the issue here, however. It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered a "cognizable independent harm" as a result of his removal from the hepatitis C treatment program . . .
>
> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief". Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is

and the grounds upon which it rests'" . . . In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint . . .

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was "endangering [his] life." . . . It alleged this medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment . . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.

* * *

Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue. Certiorari and leave to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further

> proceedings consistent with this opinion. (Citations omitted)

127 S. Ct. at 2199-2200.

The decision of the Eleventh Circuit in this case conflicts with the decision in *Erickson v. Pardus, supra,* because, in satisfaction of the pleading standard prescribed by Rule 8(a)(2), Federal Rules of Civil Procedure:

> (1) as to Phase I, the First Amended Complaint established a factual and legal framework for adjudicating the existence of a governmental privilege to arrest Mohammed notwithstanding Mr. Samuels' actual knowledge of the naturalized status of Mohammed's mother;
>
> (2) with respect to Phase II, the First Amended Complaint established a factual and legal framework for adjudicating the Government's entitlement to confine Mohammed notwithstanding its lawyer's receipt of Mrs. Khan's naturalization certificate;
>
> (3) as to Phase III, the First Amended Complaint established a factual and legal framework for adjudicating the Government's entitlement to confine Mohammed even though it had been presented with documentary evidence confirming Mohammed's status as a United States citizen since 1996; and
>
> (4) with respect to Phase IV, the First Amended Complaint established a factual

and legal framework for adjudicating the Government's entitlement to remove Mohammed from the United States even though it had been presented with documentary evidence confirming Mohammed's status as a United States citizen since 1996.

By granting Mohammed's Petition for a Writ of Certiorari, the Court would open the door to adjudications on the merits of his false arrest and false imprisonment claims against the Government under the FTCA. Moreover, the issuance of a Writ of Certiorari would focus attention upon the Government's failure to devote any resources to the identification of the [possibly uninformed] holders of derivative United States citizenship.

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted,

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RAYAD JIMMY MOHAMMED,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 08-10196 Non-Argument Calendar

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

277 Fed. Appx. 951; 2008 U.S. App. LEXIS 10759

May 15, 2008, Decided
May 15, 2008, Filed

COUNSEL: For Rayad Jimmy Mohammed, Appellant: Lawrence R. Metsch, Metsch & Metsch, P.A., Aventura, FL.

For United States of America, Appellee: Dexter A. Lee, Anne R. Schultz, Laura Thomas Rivero, U.S. Attorney's Office, Miami, FL.

JUDGES: Before ANDERSON, PRYOR and COX, Circuit Judges.

OPINION

PER CURIAM:

Rayad Jimmy Mohammed appeals the dismissal with prejudice of his civil action for failure of the complaint to state a claim. Having considered the briefs and relevant parts of the record, we conclude that the district court properly granted the motion to

dismiss filed by the United States for the reasons stated in the court's well-reasoned opinion. (R.1-34.)

AFFIRMED.

RAYAD JIMMY MOHAMMED,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Case No. 07-22306-CIV-MOORE/GARBER

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2007 U.S. Dist. LEXIS 94324

December 21, 2007, Decided
December 21, 2007, Docket

COUNSEL: For Rayad Jimmy Mohammed, Plaintiff: Lawrence Richard Metsch, LEAD ATTORNEY, Metsch & Metsch, Aventura, FL.

For United States of America, Defendant: Dexter Lee, LEAD ATTORNEY, United States Attorney's Office, Miami, FL.

JUDGES: K. MICHAEL MOORE, UNITED STATES DISTRICT JUDGE.

OPINION BY: K. MICHAEL MOORE

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss First Amended Complaint (dkt # 14).[1]

UPON CONSIDERATION of the Motion, the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

Plaintiff, Rayad Jimmy Mohammed, was born on November 9, 1981, in the Republic of Trinidad and Tobago ("Trinidad"). 1st Amend. Compl. ¶ 6. Plaintiff's mother, Raabia Mohammed, moved to the United States in 1984. *Id.* Raabia Mohammed obtained a divorce in the State of New York in May 1988, and was awarded legal custody of Plaintiff. *Id.* Plaintiff's mother subsequently remarried, and she and her United States citizen husband petitioned to adjust Plaintiff's status to that of a lawful permanent resident of the United States. *Id.*

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[1] Because Plaintiff incorporated his Motion for Summary Judgment (dkt # 15) into his Response (dkt # 20), the Court considers arguments raised in the Motion for Summary Judgment, its Response and Reply as part of the Motion to Dismiss to the extent applicable in that context.

On June 9, 1996, Plaintiff's mother was naturalized in Miami, Florida. *Id.* ¶ 7. On August 11, 1996, Plaintiff entered the United States as a lawful permanent resident. *Id.* On or about May 21, 2001, Plaintiff was convicted in the Circuit Court, Broward County, Florida, of burglary and resisting arrest without violence. *Id.* ¶ 8.

On April 25, 2005, Plaintiff was returning from a visit to Trinidad and sought entry to the United States at Miami, Florida. *Id.* ¶ 9. He was traveling on a passport issued by the Government of Trinidad. *Id.* Plaintiff was denied admission to the United States and placed in removal proceedings due to his 2001 conviction, which involved a crime of moral turpitude. *Id.* At the time of his detention, Plaintiff told the Department of Homeland Security ("DHS") Officers that his mother was a United States citizen. *Id.* When DHS contacted Plaintiff's mother to inform her of Plaintiff's detention, his mother told the DHS employee that she was a United States citizen. *Id.*

In his removal proceedings, Plaintiff was represented by counsel. *Id.* ¶ 10. He applied for a waiver of removal. A hearing was held before an immigration judge on July 27, 2005. *Id.* At the conclusion of the hearing, the Immigration Judge denied Plaintiff's application for a waiver of removal and ordered Plaintiff removed to Trinidad. Plaintiff initially advised the Immigration Judge that he wanted to appeal. On August 2, 2005, Plaintiff notified the Immigration Court that he no longer desired to pursue an appeal. *Id.*

Thereafter, Plaintiff retained a new attorney. On August 12, 2005, Plaintiff's new attorney applied to DHS for a stay on the final order of removal. *Id.* ¶ 11. In the application for stay, Plaintiff's new attorney asserted that Plaintiff had become a U.S. citizen when his mother naturalized. On August 30, 2005, Plaintiff was removed from the United States to Trinidad. *Id.* ¶ 10. On September 1, 2007, counsel for DHS received a court order staying Plaintiff's removal, pending a hearing set for September 12, 2005 on Plaintiff's new attorney's assertion that Plaintiff became a U.S. citizen when his mother naturalized. *Id.* ¶ 11. On March 9, 2006, Judge Foster recognized that Plaintiff became a U.S. citizen when his mother was naturalized in 1996 and issued an order reopening and terminating the alien removal proceedings.

II. STANDARD

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. *Milburn v. United States,* 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. *SEC v. ESM Group, Inc.,* 835 F.2d 270, 272 (11th Cir. 1988). "[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers*

v. Hardwick, 478 U.S. 186, 201-02, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Blackmun, J., dissenting) (quotations omitted); *see Brooks v. Blue Cross & Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1369 (11th Cir. 1997). Nonetheless, to withstand a motion to dismiss, a complaint must allege facts sufficient "to raise a right to relief above the speculative level[.]" *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007). Further, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 127 S. Ct. at 1964-65 (citations and quotes omitted).

III. ANALYSIS

A. FTCA: False Arrest and False Imprisonment

Plaintiff alleges that the United States, through its officers, "falsely arrested and imprisoned him." 1st Amend. Compl., ¶ 18. The elements of a cause of action for false arrest/imprisonment include: (1) "the unlawful detention and deprivation of liberty of a person;" (2) "against that person's will;" (3) "without legal authority or 'color of authority;'" and (4) "which is unreasonable or unwarranted under the circumstances." *Montejo v. Martin Memorial Medical Center, Inc.,* 935 So. 2d 1266, 1268 (Fla. Dist. Ct. App. 2006).

Plaintiff argues that he was falsely arrested/imprisoned during four phases. Pl. Reply (dkt

32) at 1-5. In the first phase, Plaintiff was originally detained on April 25, 2005, as he attempted to enter the United States from Trinidad, using a passport issued by the country of Trinidad. 1st Amend. Compl. ¶ 9. Plaintiff was held in custody pending the outcome of a removal proceeding. Phase II began on June 13, 2005, when Plaintiff's first attorney provided the DHS attorney with a copy of Plaintiff's mother's naturalization certificate. Phase III began on August 12, 2005, after the Court had issued a final order of removal, when Plaintiff's second attorney filed a motion to stay removal, asserting for the first time that Plaintiff was a U.S. citizen. Phase IV began on August 30, 2005 when Plaintiff was deported to Trinidad and required to stay there until the U.S. government recognized in March 2006 that Plaintiff became a U.S. citizen in 1996.

A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim. *Cottone v. Jenne,* 326 F.3d 1352, 1357 (11th Cir. 2003) (citing *Marsh v. Butler County,* 268 F.3d 1014, 1022 (11th Cir. 2001)). Under Florida law, probable cause is an affirmative defense to a false arrest claim. *Mailly v. Jenne,* 867 So. 2d 1250, 1251 (Fla. Dist. Ct. App. 2004); *Fla. Game & Freshwater Fish Commission v. Dockery,* 676 So. 2d 471 (Fla. Dist. Ct. App. 1996).

The factual allegations in the first amended complaint establish that the immigration inspectors had probable cause to believe that Plaintiff was an alien and inadmissible to the United States. Plaintiff

was born in Trinidad in November 1981, of parents who were both aliens. 1st Amend. Compl. ¶ 6. He was admitted to the United States as a lawful permanent resident alien on August 11, 1996. *Id.* ¶ 7. He was convicted in May 2001 of burglary and resisting arrest without violence. *Id.* ¶ 8. Further, Plaintiff was traveling on a passport issued by the country of Trinidad. *Id.* ¶ 9.

Additionally, the appropriate standard to apply in determining whether the immigration inspectors had sufficient basis to detain Plaintiff is not probable cause, but the federal standard in 8 U.S.C. § 1225(b)(2)(A) of "clearly and beyond a doubt entitled to be admitted." *See Caban v. United States,* 728 F.2d 68 (2nd Cir. 1984); *see also Smith v. State of Florida,* 719 So. 2d 1018 (Fla. Dist. Ct. App. 1998) (applying federal law to determine whether a federal law enforcement officer had a lawful basis upon which to detain and search a suspect). Under the facts alleged, Plaintiff was not clearly and beyond a doubt entitled to be admitted.

Further, "[w]henever any person . . . attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissable under any provision of this chapter." 8 U.S.C. § 1361. The factual allegations in the First Amended Complaint show that Plaintiff was traveling on a Trinidad passport and did not assert that he was a U.S. citizen until after the final order of removal had been issued. Therefore, it is clear on the

face of the complaint that Plaintiff did not meet his burden of proof to show that he was admissible into the United States. The factual allegations further show that there was ample support for the DHS officers to conclude that Plaintiff was a deportable alien.

Further, because Plaintiff was legitimately arrested, Plaintiff's detention pending removal proceedings and during the removal proceedings is not actionable for false imprisonment. *Jackson v. Navarro,* 665 So. 2d 340, 341 (Fla. Dist. Ct. App. 1995) ("*If the imprisonment is under legal authority it may be malicious but it cannot be false. . . .* [I]mprisonment under process regular and in legal form issued by lawful authority is not false.") (citations omitted) (emphasis in original). Thus, Plaintiff has not stated a claim for false arrest/imprisonment during Phase I.

Phase II began when Plaintiff's first attorney provided the DHS attorney with a copy of Plaintiff's mother's naturalization certificate. Plaintiff argues that, when DHS received a copy of the naturalization certificate, the Government should have known that Plaintiff automatically derived citizenship under § 321 of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1432, when his mother was naturalized.

In relevant part, § 321 of the INA provided in 1996 that:

> (a) A child born outside the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
>
> . . .
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents . . . ; and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

8 U.S.C. § 1432. Although Plaintiff and his first attorney did not realize it initially, Plaintiff became a U.S. citizen under this statue in 1996, when his mother with sole legal custody became a naturalized citizen. Plaintiff argues that knowledge of his citizenship should be imputed to the Defendant.

As discussed above, up to the time DHS received a copy of Plaintiff s mother's naturalization certificate, Plaintiff was legally in custody pending removal proceedings. Plaintiff, having attempted to enter the United States from another country, failed in his burden to prove that he was admissible. 8 U.S.C. § 1225(b). Even after DHS received the mother's naturalization certificate, Plaintiff did not meet his burden of proving admissibility. Neither Plaintiff nor the attorney that sent the naturalization certificate asserted that Plaintiff was a U.S. citizen. Further, Plaintiff does not allege that Defendant knew (1) whether Plaintiff's father also naturalized before Plaintiff reached the age of 18 (8 U.S.C. § 1432(a)(1)); (2) whether Plaintiff's father had died (8 U.S.C. § 1432(a)(2)); (3) whether Plaintiff's parents were legally separated; (4) if Plaintiff's parents were legally separated, whether Plaintiff's mother had legal custody of Plaintiff when she naturalized (8 U.S.C. § 1432(a)(3)); (4) whether Plaintiff was under age 18 at the time the naturalization occurred (8 U.S.C. § 1432(a)(4)); and (5) whether Plaintiff was in the United States, pursuant to a lawful admission, when the naturalization occurred, or whether he began to reside permanently in the United States while under the age of 18 years (8 U.S.C. § 1432(a)(5)).

Further, the Complaint does not address additional issues arising out of the application of § 1432(a)(3). A child only derives citizenship from the naturalization of a legally separated parent if the

parent has "sole legal custody." *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (9th Cir. 2006). Defendant is not alleged to have had knowledge that Plaintiff's mother had "sole legal custody" rather than shared custody. Also, the application of the "legal separation" requirement can be met "only by a formal act which, under the laws of the state or nation having jurisdiction of the marriage, alters the marital relationship either by terminating the marriage (as by divorce), or by mandating or recognizing the separate existence of the marital parties." *Id.* at 132. Defendant is not alleged to have been aware of the means by which Plaintiff's parents were separated.

Plaintiff argues that the U.S. government should be charged with constructive knowledge of the facts relating to Plaintiff becoming a citizen derivatively when his mother naturalized, and cites *Nguyen v. U.S.*, 2001 U.S. Dist. LEXIS 7512, 2001 WL 637573 (N.D. Tex. 2001) and *Perez v. U.S.*, 502 F. Supp. 2d 301 (N.D.N.Y. 2006) to support his contention. However, these cases are not binding on this Court, and they are distinguishable because they do not involve the right of the United States to deny admission to a person arriving at its border. *See* Def. Resp. (dkt # 29) at 15-18 (the Court adopts Defendant's analysis distinguishing these cases).

Finally, as discussed above, Plaintiff's detention pending removal proceedings and during the removal proceedings is not actionable for false imprisonment. *Jackson*, 665 So. 2d at 341. Even if Plaintiff could

prove during Phase II that he was admissible, detention during legal proceedings to determine whether he should be removed is not actionable for false imprisonment.

Phase III began after the final order of removal had been issued, when Plaintiff's second attorney moved for a stay of removal and asserted for the first time that Plaintiff was a U.S. citizen. However, Plaintiff does not allege that the motion set forth exactly how Plaintiff satisfied each of the requirements of § 321 of the INA. Ultimately, the Judge issued an order staying removal and setting a hearing on Plaintiff's new assertion that he was a U.S. citizen. Unfortunately, DHS did not receive the order staying removal until September 1, 2005, two days after Plaintiff's deportation. 1st Amend. Compl. ¶ 11. Plaintiff might have been able to avoid deportation with evidence that might have been presented at the hearing; nonetheless, DHS acted legally when it acted in accordance with the final order of removal, because it had not received the order staying removal. It was not improper for DHS to act pursuant to the last legal order it had received. Further, it was permissible to detain Plaintiff during this process. *See Jackson,* 665 So. 2d at 341. Therefore, taking Plaintiff's allegations as true, Defendant did not falsely imprison or arrest Plaintiff in Phase III.

Phase IV covers the time Plaintiff was deported and not allowed to return to the United States. Eventually, DHS determined that Plaintiff had derivatively acquired U.S. citizenship when his mother was

naturalized. Soon thereafter, Plaintiff was issued a U.S. passport and the U.S. Department of Justice moved to reopen and terminate the removal proceedings against Plaintiff. 1st Amend. Comp. ¶ 12-13. The Court finds that the time it took to process and determine that Plaintiff was a U.S. citizen did not constitute false imprisonment. Further, in this case, merely refusing Plaintiff entrance into the U.S. would not constitute false imprisonment.

IV. CONCLUSION

Because Plaintiff's arrest and detainment were lawful, Plaintiff cannot state a claim for false arrest/imprisonment. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss First Amended Complaint (dkt # 14) is GRANTED. The Clerk of Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of December, 2007.

/s/ K. Michael Moore
UNITED STATES DISTRICT JUDGE